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Supreme Court, U. S.
FILED
OCT 18 1978
MICHAEL RODAK, JR., CLERK

No. 78-5072

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

SHIRLEY DAVIS, Petitioner,

v.

OTTO E. PASSMAN, Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

REPLY OF PETITIONER

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Petitioner Shirley Davis files this reply in response to the opposition to certiorari filed by respondent Passman, and prays that the petition be granted.

Respondent has provided no persuasive reasons for denying certiorari. Analysis of both his arguments and of subsequent legislative events underscores the importance of this case and the presence of serious constitutional questions which have not been, but which should be, resolved by this Court.

I. Even Had Senate Resolution 431 Been Enacted Prior to the Senate Recess, It Would Have Provided No Remedy to Petitioner.

Respondent reprints Senate Resolution 431 -- which failed to pass prior to the congressional recess on October

15, 1978*/ -- and implies that this may show that Congress at long last is moving to stop unconstitutional employment practices by its members.**/ The short answer is that the Resolution did not pass and in fact provoked major dispute on the Senate floor. Moreover, even had this Resolution been enacted, it would have provided no remedy to petitioner. Most fundamentally, the Senate Resolution would not have addressed employment discrimination in the House of Representatives. 124 Cong. Rec. S18236 (daily ed. October 11, 1978). Additionally, by its own terms, the Resolution would have covered only some claims of discrimination by former employees of the Senate and would have covered no claims where the offending member had left office. S. Res. No. 431 § 3(4),(5),(6). Significantly, the Resolution would have conferred no cause of action in the courts upon employees suffering employment discrimination. S. Rep. No. 95-729, 95th Cong., 2d Sess. 8 (1978); 124 Cong. Rec. S18228 (daily ed. October 11, 1978). Consequently, all employees of the House of Representatives, former employees of Senators, employees of former Senators, and complainants dissatisfied with internal Senate administrative procedures, would still be left without any means to redress discrimination if the act of discrimination did

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*/ Senate Resolution 431 was introduced as an amendment to the Full Employment and Balanced Growth Act of 1978, H.R. 50, on October 11, 1978. Following debate lasting more than three hours, no action was taken on the measure. 124 Cong. Rec. S18206-211; S18226-229; S18235-249; S18250-251; S18278-280 (daily ed. October 11, 1978). The amendment was ultimately withdrawn to permit passage of the parent legislation.

**/Without its passage, in the continued absence of procedures for the resolution of discrimination complaints, "there is no effective deterrent to employment discrimination." S. Rep. No. 95-729, 95th Cong., 2d Sess. 5 (1978).

not rise to constitutional proportions.*/ Finally, in no circumstances could an employee have requested monetary damages; both the proposed Fair Employment Relations Board and the Select Committee on Ethics could have ordered only "remedial action." S. Res. 431, §§ 313(b), 321(b).**/

Even had the Senate Resolution passed, there is no assurance that it would have been enforced. Like the congressional policy clearly articulated in 1955, 5 U.S.C. § 7151 (Pet. at 15 & n. 17), it could have gone unheeded and ignored in the absence of judicial relief.

Petitioner submits that the failure of Congress to enforce existing law, the failure of the Senate even to pass the Resolution which would have provided only administrative relief to some congressional employees, and the failure of the Resolution to provide any relief to litigants in petitioner's situation, underscore the need for this Court to determine that money damages are available to a congressional employee who has suffered unconstitutional discrimination and who has no other available remedy.

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*/ The Senate Committee on Governmental Affairs, relying on the decision of the panel below, clearly believed that a judicial remedy existed for invasion of constitutional rights.

> "[S]ince no statute has granted jurisdiction to the courts for enforcement of equal opportunity in Congress, judicial remedies are available only to the extent that Constitutional rights have been violated. (Under Passman v. Davis [sic], 554 F.2d 865 (5th Cir. 1977), plaintiff may assert a discrimination claim under the equal protection provision of the Due Process Clause.)" S. Rep. No. 95-729, 95th Cong., 2d Sess. 8 (1978).

See also 124 Cong. Rec. S18209, S18228 (daily ed. October 11, 1978).

**/ To be sure, one of the permissible "remedial actions" would have been a payment out of the contingent fund of the Senate. S. Res. 431, § 331. The granting of such relief would not necessarily have been equivalent to the recovery of money damages.

II. Respondent's Strained and Artificial Reading of Applicable Law and of the Decision Below Emphasizes the Importance of this Case and the Need for Certiorari.

A. Respondent contends that, because Title VII of the Civil Rights Act of 1964 does not apply to petitioner, this Court should interpret that statute as a determination by Congress to deny all rights and remedies to its employees and for that reason should decline to recognize petitioner's constitutional rights.*/ Respondent's brief fails to recognize, however, that Congress has already explicitly stated its policy to "insure equal employment opportunities for employees without discrimination because of . . . sex. . . " 5 U.S.C. § 7151 (Pet. at 15 & n. 17). This statute, which was enacted after the Civil Rights Act of 1964, covers all congressional employees, including those (like petitioner) in non-competitive positions. Respondent does not cite any authority for the novel suggestion that Congress could, if it wished, enact legislation summarily abrogating basic constitutional rights of congressional employees. The very thrust of Bivens was to provide remedies where no alternatives existed. Petitioner submits that the Civil Rights Act of 1964 provides no ground for denying certiorari.

B. Petitioner has shown that the decision of the court below cannot be reconciled with the recent decision in Turpin v. Mailet, 579 F.2d 152 (2d Cir. 1978) (en banc) or numerous other cases cited in the petition. Subsequent to the filing of the petition, the United States Court of

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*/ Petitioner is not "specifically exempted" from Title VII coverage. The silence of Title VII on this subject may not be interpreted as an expression of an intent of Congress to deny its employees the right to judicial remedy of constitutional violations. See Pet. at 13-15.

Appeals for the Fourth Circuit determined that a cause of action for money damages "may be maintained directly under the Fifth Amendment," relying on the teachings of Bivens itself and the "preponderance of authority" in the lower federal courts for applying Bivens to violations of constitutional amendments other than the fourth. Loe v. Armistead, Nos. 77-2039, 77-2134, 77-2135 (4th Cir. August 16, 1978) (Slip Op. 11-13 & n. 2). The court expressly declined to follow the en banc opinion below.

Respondent's attempt artificially to narrow the broad holding of the court below is unavailing. If the decision below is allowed to stand, there will remain a clear conflict among the circuits in interpreting Bivens. Certiorari is particularly appropriate in cases, like this one, where an important constitutional issue has been decided in diametrically opposite ways in the circuits.

For the reasons stated above and set out in the petition, certiorari should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of October, 1978, one copy of the Reply of Petitioner was served by first-class mail, postage prepaid, upon A. Richard Gear, Esq., Hudson, Potts & Bernstein, Post Office Drawer 3008, Monroe, Louisiana 71201, Attorney for Respondent.

I further certify that all parties required to be served have been so served.

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